Richmond Health Care d/b/a Sunrise Health and Rehabilitation Center *and* 1115 Florida Division of 1199, Service Employees International Union, AFL–CIO, CLC. Case 12–CA–20900

November 30, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

Pursuant to a charge filed on June 15, 2000, the General Counsel of the National Labor Relations Board issued a complaint on July 24, 2000, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's requests to bargain following the Union's certifications in Cases 12–RC–8064 (the service unit) and 12–RC–8065 (the licensed practical nurse unit) as amended by stipulation of the parties in Cases 12–AC–37 and 12–AC–38 (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On September 29, 2000, the General Counsel filed a Motion for Summary Judgment. On October 4, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain and to furnish information that is alleged to be relevant and necessary to the Union's role as bargaining representative, but attacks the validity of the certifications on the basis of its objections to the elections in the representation proceeding.

The Respondent also argues, as it did in the underlying representation case, that its licensed practical nurse (LPN) charge nurses are supervisors within the meaning of the Act. In its response to the Notice to Show Cause the Respondent cites decisions of the Second, Third, Fourth, and Sixth Circuits in support of its argument. Each case, however, must be decided on its facts and in the instant matter, the Regional Director carefully considered the duties of the Respondent's LPN charge nurses and found that the assignments and directions made by them do not involve the exercise of independent judgment. Furthermore, the evidence fails to establish that there is a direct causal link between the charge nurses' evaluations and their assistants' wages or job tenure. See *Harborside Health Care, Inc*., 330 NLRB 1334 (2000). And finally, the Regional Director found that the nurse's role in the disciplinary process is reportorial in nature. In these circumstances, the Board denied review of the Regional Director's decision.

Further, the Respondent's citation to the decisions of the above listed Circuits is selective and fails to acknowledge that the Board's standard for determining supervisory status of nurses has been upheld by the First, Eighth, Ninth, and District of Columbia Circuits. *NLRB v. Provident Nursing Home*, 187 F.3d 133, 142–143 (1st Cir. 1999), enfg. 324 NLRB No. 46 (1997) (not reported in Board volumes); *Lynwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042 (8th Cir. 1998), enfg. 323 NLRB No. 200 (1997) (not reported in Board volumes); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997), enfg. 322 NLRB No. 54 (1996) (not reported in Board volumes); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997), enfg. 321 NLRB No. 100 (1996) (not reported in Board volumes).

Moreover, we note that the Supreme Court has recently granted certiorari to resolve the conflict in the circuits over the meaning of the term "independent judgment" in Section 2(11), as well as the issue of which party has the burden of proof in establishing supervisory status. *NLRB v. Kentucky River Community Care, Inc.*, S.Ct. No. 99–1815 (cert granted September 26, 2000).

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are no issues warranting a hearing with respect to the Union's request for information. The Respondent admits that by letters dated January 19 and June 28, 2000, the Union requested that the Respondent furnish it with the following information with respect to the service unit and the LPN unit:

> 1. A list of current employees, including their names, dates of hire, rates of pay, job classification, department, last known address, and phone number;
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> 2. A copy of all current company personnel policies and procedures which relate to or have an effect on bargaining unit employees, including but not lim-

ited to, leave of absence, shifts, starting times, hiring rules, safety rules, vacation, holidays, and overtimes;

3. A copy of all company fringe benefit plans, including pension, profit sharing, severance, stock initiative, health insurance, apprenticeship, training, legal services, child care, or any other plans which relate to the employees, and where applicable, copies of summary plan descriptions for such plans;

4. Copies of all current job descriptions for bargaining unit employees;

5. Copies of any company wage and salary plans, including schedules for employees on incentive jobs;

6. Copies of OSHA 200 logs for the past 3 years;

7. The Cost Report files with the AHCA for the last 3 years;

8. Any and all agreements signed with all subcontractors that relate to the bargaining unit employees' jobs, wages, benefits, and working conditions.

In its answer, the Respondent admits only that "certain" of this information is necessary and relevant for purposes of collective bargaining. We find that with the exception of the cost and subcontracting information requested in items 7 and 8, the foregoing types of information are presumptively relevant for purposes of collective bargaining and must be furnished on request.[1] The Respondent has not attempted to rebut the relevance of the information requested in Items 1–6, and we therefore find that no material issues of fact exist with respect to the Respondent's refusal to furnish this information.

Accordingly, we grant the Motion for Summary Judgment, and we will order the Respondent to bargain and to furnish the requested information, with the exception of the cost and subcontracting information requested in Items 7 and 8.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Georgia corporation, is engaged in operation of an extended care nursing home at its facility in Sunrise, Florida. During the past 12 months prior to issuance of the complaint, the Respondent, in conducting its business operations, derived gross revenues in excess of $100,000 and during that same period of time purchased and received at its Sunrise, Florida facility goods valued in excess of $10,000 directly from points located outside the state of Florida. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the elections held May 9, 1997, the Union was certified on July 22, 1999, as the exclusive collective-bargaining representative of the employees in the following appropriate units:

THE SERVICE UNIT

All full-time and regular part-time certified nursing assistants, dietary employees, cooks, maintenance employees, medical records employees, unit secretaries, activities employees, social services assistants and central supply employees employed by the Employer at its Sunrise, Florida facility; excluding all other employees, housekeeping employees, licensed practical nurses, office clerical employees, occupational therapists, registered nurses, physical therapists, guards and supervisors as defined in the Act.

and

THE LPN UNIT

All full-time and regular part-time licensed practical nurse (LPN) charge nurses employed by the Employer at its Sunrise, Florida facility; excluding certified nursing assistants (CNA's), dietary employees, cooks, maintenance employees, medical records employees, unit secretaries, activities employees, social services assistants, central supply employees, registered nurses,

[1] *Zeta Consumer Products Corp*., 326 NLRB 293 (1998) (OSHA 200 logs); *Trustees of Masonic Hall*, 261 NLRB 436 (1982) (compensation and employment information); *Mobay Chemical Corp*., 233 NLRB 109 (1977) (same).

Item 7's reference to the "Cost Report files with the AHCA" is not further explained in the record, but it appears that the Union was seeking financial information. The Board has held that financial information is not presumptively relevant and that the union must therefore demonstrate the relevance of the information. See *Troy Hills Nursing Home*, 326 NLRB 1465 fn.2 (1998). Similarly, the Board has held that the subcontracting information sought in item 8 is not presumptively relevant. *Associated Ready Mixed Concrete*, 318 NLRB 318 (1995), enfd. 108 F.3d 1182 (9th Cir. 1997), followed in *Dexter Fastener Technologies*, 321 NLRB 612– 613 fn. 2 (1996).

Here, neither the complaint nor the Motion for Summary Judgment explain why the Respondent had an obligation to provide the cost and subcontracting information. Based on *Troy Hills* and *Associated Ready Mixed*, we deny the General Counsel's Motion for Summary Judgment with respect to the information requested in items 7 and 8, and we remand those issues to the Regional Director for further appropriate action. In the event that the subcontracting information issue proceeds to hearing, the parties are specifically requested to brief the question of the continued validity of the *Associated Ready Mixed* line of precedent. See *Torrington Industries*, 307 NLRB 809, 810–811 (1992) (holding that in cases factually similar to *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), a decision to subcontract bargaining unit work is a mandatory subject of bargaining), and *Overnite Transportation Co*., 330 NLRB 1275 (2000), enf. denied in relevant part Nos. 00–3421 and 00–1744 (3d Cir. Nov. 8, 2000).

office clerical employees, occupational and physical therapists, watchmen, guards and supervisors as defined in the Act, and all other employees.

The Union continues to be the exclusive representative under Section 9(a) of the Act.[2]

B. Refusal to Bargain

Since January 19, 2000, the Union has requested the Respondent to bargain and to furnish information with respect to both the service unit and the LPN unit, and, since January 19, 2000, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after January 19, 2000, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the service and LPN units and to furnish the Union requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested by letters dated January 19 and June 28, 2000, with the exception of the cost and subcontracting information.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Richmond Health Care d/b/a Sunrise Health and Rehabilitation Center, Sunrise, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with 1115 Florida Division of 1199, Service Employees International Union, AFL–CIO, CLC, as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate units on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time certified nursing assistants, dietary employees, cooks, maintenance employees, medical records employees, unit secretaries, activities employees, social services assistants and central supply employees employed by the Employer at its Sunrise, Florida facility; excluding all other employees, housekeeping employees, licensed practical nurses, office clerical employees, occupational therapists, registered nurses, physical therapists, guards, and supervisors as defined in the Act.

(b) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate units on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time licensed practical nurse (LPN) charge nurses employed by the Employer at its Sunrise, Florida facility; excluding certified nursing assistants (CNA's), dietary employees, cooks, maintenance employees, medical records employees, unit secretaries, activities employees, social services assistants, central supply employees, registered nurses, office clerical employees, occupational and physical therapists, watchmen, guards and supervisors as defined in the Act, and all other employees.

(c) Furnish the Union information it requested on January 19 and June 28, 2000, with the exception of the cost and subcontracting information.

[2] As alleged in the complaint and admitted in the answer, on June 13, 2000, in Cases 12–AC–37 and 12–AC–38, the Regional Director for Region 12 of the Board, pursuant to stipulations executed by the Respondent and the Union, amended the certifications issued by the Board in Cases 12–RC–8064 and 12–RC–8065, respectively, to substitute the Union as the certified union with respect to the service unit and the LPN unit, respectively.

(d) Within 14 days after service by the Region, post at its facility in Sunrise, Florida, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 12 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 19, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with 1115 Florida Division of 1199, Service Employees International Union, AFL–CIO, CLC as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time certified nursing assistants, dietary employees, cooks, maintenance employees, medical records employees, unit secretaries, activities employees, social services assistants and central supply employees employed by us at our Sunrise, Florida facility; excluding all other employees, housekeeping employees, licensed practical nurses, office clerical employees, occupational therapists, registered nurses, physical therapists, guards, and supervisors as defined in the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time licensed practical nurse (LPN) charge nurses employed by us at our Sunrise, Florida facility; excluding certified nursing assistants (CNA's), dietary employees, cooks, maintenance employees, medical records employees, unit secretaries, activities employees, social services assistants, central supply employees, registered nurses, office clerical employees, occupational and physical therapists, watchmen, guards, and supervisors as defined in the Act, and all other employees.

WE WILL furnish the Union the information it requested on January 19 and June 28, 2000, with the exception of the cost and subcontracting information.

SUNRISE HEALTH & REHABILITATION CENTER

[3] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."